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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 CLIFTON M. LEWIS,) NO. EDCV 09-01938-MAN
12 Plaintiff,)
13 v.) MEMORANDUM OPINION
14 MICHAEL J. ASTRUE, Commissioner) AND ORDER
15 of Social Security,)
16 Defendant.)

17 Plaintiff filed a Complaint on October 15, 2009, seeking review of
18 the denial by the Social Security Commissioner ("Commissioner") of
19 plaintiff's application for disability insurance benefits ("DIB") for a
20 closed period of disability, from August 1, 2001, through June 1, 2004.
21 On November 13, 2009, the parties consented to proceed before the
22 undersigned United States Magistrate Judge pursuant to 28 U.S.C. §
23 636(c). The parties filed a Joint Stipulation on July 16, 2010, in
24 which: plaintiff seeks an order reversing the Commissioner's decision
25 and awarding benefits or, in the alternative, remanding the matter for
26 further administrative proceedings; and defendant seeks an order
27 affirming the Commissioner's decision. The Court has taken the parties'
28 Joint Stipulation under submission without oral argument.

1 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**

2

3 On December 26, 2001, plaintiff filed an application for a period

4 of disability and DIB, in which he alleged a disability onset date of

5 August 1, 2001 due to a back injury. (Administrative Record ("A.R.")

6 59-61, 71.) Plaintiff has past relevant work as a handyman and mason.

7 (A.R. 72.)

8

9 After the denial of plaintiff's application initially and upon

10 reconsideration (A.R. 22-27, 30-33), plaintiff timely requested a

11 hearing (A.R. 34). On February 25, 2003, plaintiff, who was represented

12 by counsel, testified at a hearing before Administrative Law Judge John

13 W. Belcher ("ALJ Belcher"). (A.R. 197-227.) On June 2, 2003, a

14 supplemental hearing was held. (A.R. 228-49.) On July 17, 2003, ALJ

15 Belcher denied plaintiff's application. (A.R. 15-18.) Plaintiff timely

16 appealed ALJ Belcher's decision, and the Appeals Council denied

17 plaintiff's request for review. (A.R. 4-6.) On May 20, 2004, plaintiff

18 sought review in this Court (Case No. EDCV 04-593-MAN), which remanded

19 the case for further proceedings in a March 30, 2006 Order (the "2006

20 Remand Order").¹ (A.R. 280-301.)

21

22 On May 11, 2006, the Appeals Council effectuated the 2006 Remand

23 Order (A.R. 279) and remanded the matter for a supplemental hearing,

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25 ¹ In its 2006 Remand Order, the Court ordered the ALJ to: (1)

26 "clarify and develop the record as to whether Plaintiff's back

27 impairment requires fusion surgery, and therefore meets a Listing,

28 through eliciting an additional opinion on this specific issue from a

medical expert, an examining doctor, or one of Plaintiff's treating

doctors;" and (2) "address each of Plaintiff's claimed limitations in

his decision on remand." (A.R. 293, 299.)

1 which occurred on August 3, 2006. (A.R. 368-89.) Plaintiff again
2 testified before ALJ Belcher. (*Id.*) At the hearing, plaintiff, through
3 his attorney, requested a closed period of disability from August 1,
4 2001, through June 1, 2004. (A.R. 371.) On January 19, 2007, ALJ
5 Belcher again denied plaintiff's application. (A.R. 256-60.) On April
6 10, 2007, plaintiff again appealed to this Court (Case No. EDCV 07-412-
7 MAN), and on August 29, 2008, the Court again remanded the case for
8 further proceedings (the "2008 Remand Order"). (A.R. 438-50.) In the
9 2008 Remand Order, the Court ordered the ALJ to specify the allegations
10 of pain and/or symptoms he found not to be credible and provide clear
11 and convincing reasons, based upon substantial evidence in the record,
12 for rejecting them. (A.R. 448.)

13
14 On February 20, 2009, the Appeals Council effectuated the 2008
15 Remand Order. (A.R. 451.) On April 6, 2009, plaintiff testified at a
16 hearing before Administrative Law Judge Joseph D. Schloss (the "ALJ").
17 (A.R. 416-29.) On July 2, 2009, the ALJ denied plaintiff's application.
18 (A.R. 393-99.)

20 SUMMARY OF ADMINISTRATIVE DECISION

21
22 The ALJ found that plaintiff did not engage in substantial gainful
23 activity from August 1, 2001, the alleged onset date, through September
24 30, 2008, the date last insured.² (A.R. 395.) The ALJ determined that

26 ² Plaintiff alleges, and seeks benefits for, a closed period of
27 disability from August 1, 2001, through June 1, 2004. (Joint
28 Stipulation at 14; A.R. 418.) In his decision, however, the ALJ
analyzed a period of disability from August 1, 2001 through September
30, 2008. (A.R. 393-99.) The Court will only focus on the closed

1 plaintiff had a severe musculoskeletal impairment. (*Id.*) The
2 impairment did not meet or equal any of the impairments listed in 20
3 C.F.R. Part 404, Subpart P, Appendix 1. (A.R. 396.)

4
5 The ALJ determined that plaintiff had the residual functional
6 capacity ("RFC") to:

7
8 perform light work as defined in 20 CFR 404.1567(b) except
9 lifting and/or carrying more than 20 pounds occasionally and
10 10 pounds frequently with no significant limitations in his
11 ability to stand, walk or sit. [Plaintiff] is precluded from
12 work requiring the use of ladders, ropes, or scaffolds, work
13 requiring the use of vibratory tools, work at unprotected
14 heights and not [*sic*] requiring more than occasional crawling
15 and kneeling. There are no restrictions on bending, stooping
16 or crouching. There are no mental limitations.

17
18 (A.R. 396.)

19
20 The ALJ found that plaintiff was unable to perform his past
21 relevant work. (A.R. 398.) Having considered plaintiff's age,
22 education, work experience, and RFC, and in reliance on testimony from
23 the vocational expert, the ALJ found that jobs existed in the national
24 economy that plaintiff could have performed, including jobs as a bench
25 assembler, hand packager/inspector, and cashier II. (A.R. 398-99.)

26
27 _____
28 period of disability alleged by plaintiff.

1 Accordingly, the ALJ concluded that plaintiff was not disabled, as
 2 defined in the Social Security Act, from August 1, 2001, through
 3 September 30, 2008.³ (A.R. 399.)

4 5 STANDARD OF REVIEW

6
 7 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's
 8 decision to determine whether it is free from legal error and supported
 9 by substantial evidence in the record as a whole. Orn v. Astrue, 495
 10 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is "'such relevant
 11 evidence as a reasonable mind might accept as adequate to support a
 12 conclusion.'" *Id.* The "evidence must be more than a mere scintilla but
 13 not necessarily a preponderance." Connett v. Barnhart, 340 F.3d 871,
 14 873 (9th Cir. 2003)(citation omitted).

15
 16 Although this Court cannot substitute its discretion for that of
 17 the Commissioner, the Court nonetheless must review the record as a
 18 whole, "weighing both the evidence that supports and the evidence that
 19 detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y of
 20 Health and Human Servs., 846 F.2d 573, 576 (9th Cir. 1988); see also
 21 Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). "The ALJ is
 22 responsible for determining credibility, resolving conflicts in medical
 23 testimony, and for resolving ambiguities." Andrews v. Shalala, 53 F.3d
 24 1035, 1039-40 (9th Cir. 1995). "Where the evidence as a whole can
 25 support either a grant or a denial, [a federal court] may not substitute
 26 [its] judgment for the ALJ's." Bray v. Comm'r of Soc. Sec. Admin., 554

27
 28 ³ As discussed in Note 2, *supra*, the correct, closed period of
 disability is August 1, 2001, through June 1, 2004.

1 F.3d 1219, 1222 (9th Cir. 2009)(citation and internal punctuation
2 omitted).

3
4 The Court will uphold the Commissioner's decision when the evidence
5 is susceptible to more than one rational interpretation. Tommasetti v.
6 Astrue, 553 F.3d 1035, 1038 (9th Cir. 2008); Burch v. Barnhart, 400 F.3d
7 676, 679 (9th Cir. 2005); *see also* Batson v. Comm'r of Soc. Sec. Admin.,
8 359 F.3d 1190, 1193 (9th Cir. 2004)("if evidence exists to support more
9 than one rational interpretation, we must defer to the Commissioner's
10 decision"). However, the Court may review only the reasons stated by
11 the ALJ in his decision "and may not affirm the ALJ on a ground upon
12 which he did not rely." Orn, 495 F.3d at 630; *see also* Connett, 340
13 F.3d at 874. The Court will not reverse the Commissioner's decision if
14 it is based on harmless error, which exists only when it is "clear from
15 the record that an ALJ's error was 'inconsequential to the ultimate
16 nondisability determination.'" Robbins v. Soc. Sec. Admin., 466 F.3d
17 880, 885 (9th Cir. 2006)(*quoting* Stout v. Comm'r, 454 F.3d 1050, 1055-56
18 (9th Cir. 2006)); *see also* Tommasetti, 533 F.3d at 1038; Burch, 400 F.3d
19 at 679.

20 21 DISCUSSION

22 23 I. The ALJ's Finding Regarding The Credibility Of Plaintiff's Pain 24 Testimony Is Reversed.

25
26 Plaintiff alleges that the ALJ failed to properly consider his
27 subjective complaints regarding his pain and symptoms in assessing his
28 credibility. (Joint Stipulation at 4.) For the reasons set forth

1 below, the Court agrees.

2
3 Once a disability claimant produces evidence of an underlying
4 physical impairment that is reasonably likely to be the source of his
5 subjective symptom(s), all subjective testimony as to the severity of
6 the symptoms must be considered. Moisa v. Barnhart, 367 F.3d 882, 885
7 (9th Cir. 2004); Bunnell v. Sullivan, 947 F.2d 341, 345 (9th Cir.
8 2001)(*en banc*); see also 20 C.F.R. § 404.1529(a) (explaining how pain
9 and other symptoms are evaluated). Moreover, "unless an ALJ makes a
10 finding of malingering based on affirmative evidence thereof, he or she
11 may only find an applicant not credible by making specific findings as
12 to credibility and stating clear and convincing reasons for each."
13 Robbins, 466 F.3d at 883. Further, the ALJ's credibility findings must
14 be "sufficiently specific" to allow a reviewing court to conclude that
15 the ALJ rejected the claimant's testimony on permissible grounds and did
16 not arbitrarily discredit the claimant's testimony. Moisa, 367 F.3d at
17 885.

18
19 This is the third time this issue has been raised. In the 2006
20 Remand Order, the Court instructed the Commissioner, on remand, to
21 further consider not only plaintiff's back pain but also his other
22 alleged symptoms, which include, without limitation, alleged pain,
23 stiffness, muscle spasms, numbness in his left leg and foot (and
24 occasionally in his right leg), and pain when walking, which required
25 him to walk hunched over. (A.R. 299; see, e.g., A.R. 126, 132, 141,
26 169, 183.) ALJ Belcher failed to do this, notwithstanding the Court's
27 specific order that this be done. ALJ Belcher should have addressed
28 each of plaintiff's claimed limitations and the extent, if any, to which

1 they impacted his ability to work during his alleged period of
2 disability. ALJ Belcher's failure to do so constituted error.

3
4 In the 2008 Remand Order, the Court again instructed the
5 Commissioner, on remand, to "specify, based on substantial evidence of
6 record, which allegations of pain and/or other symptoms he finds to be
7 not credible." (A.R. 448.) Because it was undisputed that plaintiff
8 suffered from a back impairment during the period of disability that
9 could have caused pain and symptoms such as those he alleges, the Court
10 ordered the Commissioner to provide clear and convincing reasons, based
11 upon substantial evidence in the record, for rejecting plaintiff's
12 testimony. (*Id.*) Yet again, the ALJ failed to provide clear and
13 convincing reasons based on substantial evidence.

14
15 The ALJ states the following reasons for rejecting plaintiff's
16 testimony regarding his pain and symptoms: (1) it is not supported by
17 objective medical evidence; (2) plaintiff's testimony is inconsistent
18 with the facts in the record; (3) plaintiff has a poor work history; and
19 (4) plaintiff's medication dosage would not cause adverse side effects.
20 (A.R. 397-98.) In citing these reasons, the ALJ appears to rely almost
21 exclusively on the opinion of Dr. Arthur Lorber, a medical expert.
22 (A.R. 396-97.) None of these reasons constitute clear and convincing
23 reasons based on substantial evidence as required.

24
25 It is undisputed that plaintiff had a back impairment that could
26 have caused the type and severity of pain complained of by plaintiff
27 during his alleged closed period of disability, and there is no finding
28 by the ALJ that plaintiff was malingering. Plaintiff's medical records

1 reflect that plaintiff injured his back in August 2001, and underwent a
2 lumbar laminectomy on November 26, 2001. (A.R. 101-102.) After the
3 surgery and throughout the period of disability, plaintiff continuously
4 reported back pain and was prescribed pain medication. (See, e.g., A.R.
5 116, 122, 160.) Although plaintiff's doctors found little objective
6 medical evidence to support plaintiff's pain testimony, neither his
7 treating physicians nor the medical experts thought that plaintiff was
8 malingering. To the contrary, plaintiff's treating physicians all
9 acknowledged and treated the pain (see, e.g., A.R. 168, 170, 173), and
10 some recommended additional surgery (A.R. 122, 173). Indeed, two of the
11 medical experts acknowledged in their testimony that it is possible for
12 plaintiff to have been experiencing significant levels of pain. (A.R.
13 219, 378-79.) Thus, despite the lack of objective medical evidence --
14 which by itself cannot discredit plaintiff's pain testimony -- there is
15 a consensus that the severity of pain allegedly experienced by plaintiff
16 is possible. See Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998).

17
18 The ALJ's remaining credibility findings are equally unavailing.
19 The ALJ asserts that plaintiff's testimony is inconsistent with the
20 facts. Indisputably, in evaluating credibility, an ALJ is entitled to
21 rely on factors such as inconsistencies between a claimant's testimony
22 and the facts. Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir.
23 2002). Here, however, the evidence does not point to inconsistencies.
24 First, the ALJ implied that plaintiff lied about the advice he received
25 from his treating physician, Dr. H. Dhillon. (A.R. 397.) While the ALJ
26 is correct that Dr. Dhillon's treatment notes do not contain an express
27 recommendation for additional surgery, such an omission is not
28 substantial evidence that plaintiff is lying. To the contrary,

1 plaintiff's treatment notes reflect that he has reported to two other
2 physicians that Dr. Dhillon recommended a lumbar fusion. (A.R. 173,
3 351.) Moreover, Dr. Dhillon's treatment notes from April 24, 2003,
4 indicate that plaintiff told Dr. Dhillon that "[h]e can't do surgery,"
5 which suggests Dr. Dhillon recommended surgery and is consistent with
6 plaintiff's testimony that he did not want additional surgery due to the
7 lack of guaranteed success. (A.R. 293, 361.) Second, the ALJ stated
8 that the record failed to support plaintiff's assertion that "he
9 reclined and spent most of his time using a heat pack." (A.R. 397.)
10 Nothing in the record, however, remotely suggests that plaintiff is
11 lying about his daily activities. No person testified to the contrary,
12 and -- consistently with plaintiff's testimony -- Dr. Dhillon's
13 treatment notes reflect that plaintiff had "heat marks." (A.R. 235,
14 361.)

15
16 Plaintiff's work history also does not constitute a clear and
17 convincing reason for rejecting plaintiff's pain testimony. A poor work
18 record may negatively affect a claimant's credibility. Thomas, 278 F.3d
19 at 958-59. While Plaintiff's work history is not a model of
20 consistency, the record reflects that plaintiff worked to some degree
21 most of the years prior to his period of disability, and he has engaged
22 in some level of work after his period of disability. (A.R. 456.) As
23 such, while a plaintiff's spotty work history may be a valid
24 consideration, in this instance, it is not a clear and convincing reason
25 for rejecting plaintiff's credibility.

26
27 Finally, the ALJ's finding that plaintiff's testimony regarding the
28 side effects of his medications is not credible is also without merit.

1 The ALJ based his finding entirely on Dr. Lorber's testimony that he
2 could not anticipate any adverse side effects from the dosage of Vicodin
3 that plaintiff was allegedly taking in January 2004.⁴ (A.R. 397.) Even
4 if Dr. Lorber's testimony was sufficient by itself, it was based on a
5 lower dosage amount than plaintiff was taking during the period of
6 disability. Dr. Lorber testified that, as of January 15, 2004,
7 plaintiff's treating physician, Dr. David H. Thio, reported that
8 plaintiff was taking one to one and a half tablets of Vicodin per day.
9 (A.R. 423.) The Court cannot find this treatment note in the record.
10 Instead, contrary to the ALJ's assertion that "[e]arly treatment records
11 do not indicate how often [plaintiff] was taking Vicodin" (A.R. 397),
12 the record reflects that plaintiff was taking three to four tablets of
13 Vicodin through the alleged period of disability. (A.R. 184, 351.) It
14 was not until January 17, 2005, after the alleged period of disability,
15 that plaintiff reduced his dosage. (A.R. 349.) As such, the Court also
16 finds that the ALJ failed to properly address and dismiss plaintiff's
17 side effects.

18
19 Accordingly, as there is no clear and convincing reason to find
20 plaintiff's pain testimony not credible, the ALJ erred when he
21 discredited plaintiff's pain.

22
23 **II. Reversal And Remand For The Payment Of Benefits Is Appropriate.**

24
25 The Court concludes that there is no reason to remand this case for
26 further administrative proceedings.

27
28 ⁴ The ALJ again fails to reference plaintiffs' complaints about Neurontin. (A.R. 123.)

1 In the Ninth Circuit, courts have the discretion to "credit as
2 true" the testimony of claimants when the ALJ has failed to provide
3 legally sufficient reasons for rejecting such testimony. See, e.g.,
4 Benecke v. Barnhart, 379 F.3d 587, 594 (9th Cir. 2004); Harman v. Apfel,
5 211 F.3d 1172, 1179 (9th Cir. 2000); Swenson v. Sullivan, 876 F.2d 683,
6 689 (9th Cir. 1989). Specifically, in Varney v. Sec'y of Health and
7 Human Servs., 859 F.2d 1396, 1401 (9th Cir. 1988), the Ninth Circuit
8 stated that:

9
10 [W]here there are no outstanding issues that must be resolved
11 before a proper disability determination can be made, and
12 where it is clear from the administrative record that the ALJ
13 would be required to award benefits if the claimant's excess
14 pain testimony were credited, we will not remand solely to
15 allow the ALJ to make specific findings regarding that
16 testimony. Rather, we will follow the Eleventh Circuit's
17 practice and take that testimony to be established as true.

18
19 See also Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1996)(accepting
20 plaintiff's testimony as true and granting payment for benefits). That
21 principle governs here.

22
23 This case was remanded twice, once in 2006 and again in 2008,
24 based, in part, on errors in the consideration of plaintiff's
25 credibility and pain testimony. Thus, this is the third time that the
26 Commissioner has attempted and failed to provide clear and convincing
27 reasons, based upon substantial evidence, for rejecting plaintiff's pain
28 testimony. In Benecke, the Ninth Circuit emphasized that "[a]llowing

1 the Commissioner to decide the issue again would create an unfair 'heads
2 we win; tails, let's play again' system of disability benefits
3 adjudication," and unfairly "delay much needed income for claimants who
4 are unable to work and are entitled to benefits." 379 F.3d at 595.
5 Moreover, in Moisa, after finding that reversal was justified due to the
6 ALJ's commission of clear error in rejecting the claimant's pain
7 testimony, the Ninth Circuit concluded that a remand for an award of
8 benefits, rather than for further proceedings on the credibility issue,
9 was appropriate. 367 F.3d at 887. The Ninth Circuit reasoned that
10 "[t]he Commissioner, having lost this appeal, should not have another
11 opportunity to show that [plaintiff] is not credible any more than
12 [plaintiff], had he lost, should have an opportunity for remand and
13 further proceedings to establish his credibility." *Id.*

14
15 If plaintiff's pain testimony is credited as true, which the Court
16 believes is appropriate under the circumstances, the record shows that
17 plaintiff is disabled. Three vocational experts testified that, if
18 plaintiff were required to have unscheduled breaks throughout the day,
19 there would be no jobs that exist in the national economy that he could
20 perform. Corinne J. Porter testified that, if an individual required
21 two to three thirty-minute unscheduled breaks each day, "[t]here
22 wouldn't be any work available." (A.R. 242.) Sandra Fioretti testified
23 that, if an individual needed to recline four hours out of a work week
24 to rest his back, "it would erode the labor market completely," and such
25 jobs "would be very rare." (A.R. 387-88.) Luis Mas testified that, if
26 an individual required an additional four hours of breaks in a work
27 week, he would not stay employed. (A.R. 428.)

1 Thus, the Court finds that plaintiff was disabled throughout the
2 relevant closed period, and reversal and remand for an award of benefits
3 is warranted.

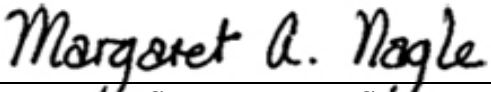
4
5 **CONCLUSION**
6

7 Accordingly, for the reasons stated above, the Commissioner's
8 decision is REVERSED, and this case is remanded to the Commissioner for
9 the payment of benefits to plaintiff. Judgement shall be entered in
10 favor of plaintiff, and this action shall be dismissed with prejudice.
11

12 IT IS FURTHER ORDERED that the Clerk of the Court shall serve
13 copies of this Memorandum Opinion and Order and the Judgment on counsel
14 for plaintiff and for defendant.
15

16 **LET JUDGMENT BE ENTERED ACCORDINGLY.**
17

18 DATED: September 14, 2010

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20 MARGARET A. NAGLE
21 UNITED STATES MAGISTRATE JUDGE
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